

No. 78-1001

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

CARL D. WEST AND ANDREW J. DAIGLE, PETITIONERS

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF HOUSING
AND URBAN DEVELOPMENT

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

WADE H. MCCREE, JR.
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Washington, D.C. 20530*

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Petitioners assert that their claims under flood insurance policies issued pursuant to the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, were improperly denied.

1. Petitioners West and Daigle brought suit asserting claims as insureds under policies issued in accordance with the National Flood Insurance Act of 1968. After a consolidated jury trial, West obtained a verdict of \$17,500, the policy limit, and Daigle obtained a verdict of \$12,084.56 (Pet. App. A-6).¹ The insurer appealed.²

¹Each award was subsequently reduced by the \$200 deductible under the policy (*ibid.*).

²The Secretary of Housing and Urban Development now administers the flood insurance program. 42 U.S.C. 4011. Prior to January 1, 1978, the National Flood Insurers Association operated the insurance program (see Pet. App. A-6 n.1.)

The court of appeals held that although there was flooding in or near petitioners' houses at about the time structural damage to them was first observed, the expert testimony "established without contradiction that the immediate cause of the damage was the settlement of the house due to uneven soil support" (Pet. App. A-11, A-14). The insurance policies at issue specifically exclude liability for loss due to "any * * * earth movement" except mudslides.³ The court of appeals consequently reversed, concluding that the district court "should have applied the policy exclusion to the undisputed evidence and directed a verdict for [the insurer]" (Pet. App. A-12, A-15).⁴

2. Petitioners contend here (Pet. 9-16) that a jury question was presented about the extent of flood damage because they introduced sufficient evidence showing that structural damage to the foundations of their houses was caused directly by flood waters. This evidentiary issue was resolved against petitioners by the court of appeals, however, and does not merit further review by the Court. In any event, petitioners' claim that the damage was caused directly by the "force of the flood waters" (Pet. 11), rather than earth movements, is unsupported by the record; the foundations of the houses were at all times embedded firmly in earth and damage to them therefore necessarily was caused by earth movement (see Pet. App. A-9, A-13).

³The policies provided: "Perils Excluded—This Company shall not be liable for loss: * * * (d) by * * * erosion, earthquake, landslide or any other earth movement except such mudslides as are covered under the Peril of flood * * *" (Pet. App. A-7 to A-8). The court of appeals found "no evidence of a mudslide in this record" (Pet. App. A-11).

⁴As to petitioner West, however, the court of appeals also remanded for a new trial on the issue of water damage to the interior and contents of the West house that resulted when flood waters entered the house to the depth of one and one-half inches (Pet. App. A-13, A-15).

The decision of the court of appeals applying the exclusion for "earth movement" is consistent with the purposes of the National Flood Insurance Act (see Pet. 16-23).⁵ The Act authorizes the Secretary to provide by regulation the limits on coverage necessary to carry out the flood insurance program. 42 U.S.C. 4013(a). In accordance with the definition of flood contained in the Act, generally limiting flood to "inundation" or "overflow" from rising waters (42 U.S.C. 4121(a)(1)),⁶ the Secretary appropriately excluded by regulation losses by "land slippage" other than mudslide. 24 C.F.R. 1911.4(c) (1977) (Pet. App. A-35). And the policies here, consistent with this regulation, properly excluded losses by "earth movement."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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⁵The legislative history relied on by petitioners (Pet. 19-20) simply establishes that mudflows are a covered risk, whether or not a landslide is already in progress; it also demonstrates that landslides clearly are not a covered risk, regardless of their cause.

⁶The Act also covers risk of mudslides proximately caused by accumulations of water, 42 U.S.C. 4121(b), and the collapse or subsidence of shore land caused by water exceeding "anticipated cyclical levels." 42 U.S.C. 4121(c).